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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

HIRAM J. BAILEY AND
REBA BAILEY - - - - - - - - - *Petitioners*

VS. PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

J. A. RUNYON,
COMMONWEALTH'S ATTORNEY,
35TH JUDICIAL DISTRICT, AND
W. R. WALTERS, TRUSTEE - - - - *Respondents*

TO THE HON. CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the decree of the Court of Appeals for the State of Kentucky of an opinion entered by that Court, and judgment entered thereon in the Pike Circuit Court, on October 27, 1956, in accordance with the mandate of the Court of Appeals of Kentucky, overruling petition for re-hearing dated October 12, 1956. Associate Justice, Stanley Reed, entered an order on January 8, 1957, extending the time for filing petition for writ of certiorari to and including February 15, 1957.

OPINIONS BELOW

The opinion of the Court below rendered by the Kentucky Court of Appeals on June 22, 1956, has been

reported in the Kentucky Decisions of the Southwestern Reporter, 2nd Series, Vol. 293, Page 631.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section U. S. C. 28:344 (a).

The opinion of the Kentucky Court of Appeals was filed June 22, 1956; Petition for Rehearing was filed July 19, 1956. No opinion on the Petition for Rehearing was filed by the Court, and the mandate of the Court of Appeals of Kentucky, was entered, and became final on October 12, 1956.

Application for stay of mandate, pending application in this Court for writ of certiorari has not been filed, as the parties will probably agree to withhold any action on judgment or mandate pending the outcome of this application for writ of certiorari in this Court.

QUESTIONS PRESENTED

The fundamental questions presented in this petition are whether or not a Court, under a so-called agreed judgment, can by injunction force the petitioners to give up certain rights which are inherent and inalienable under the 14th Amendment of the Constitution of the United States, by first enjoining and restraining them from having any interest in, owning, conducting, or operating a motel, hotel, restaurant, or any place of entertainment business in Pike County, Kentucky, and second, whether or not the Circuit Court of Pike County, Kentucky, can force the petitioners to sell and dispose of certain real estate owned by them under the police powers of the State, even though said real estate had not been used or occupied for business or any other purpose for a period of about

5 years, and third, inflicting penalties not provided by the law of the Commonwealth of Kentucky, or the United States.

SUMMARY STATEMENT

The essential facts are contained in the bill of complaint, and the separate answers of each of the respondents.

On May 28, 1955, J. A. Runyon, Commonwealth's Attorney of Pike County, Kentucky, filed an action against the petitioners herein, Hiram J. Bailey, Reba Bailey, Elizabeth Baker, and Roy Baker, seeking to confiscate and sell property owned by the petitioners herein, alleging it was being used for bootlegging purposes under authority of KRS 242.310, and 242.320. Without having a trial of this case, the Commonwealth's Attorney told the petitioners herein that if they would agree that the said property be sold, and further agree that other property they owned in the opposite side of Pike County, known as the Trocadero property, and further agree that a permanent and perpetual injunction be issued against them, enjoining and restraining them from investing, having any interest in, owning, conducting or operating a restaurant business, or any place of entertainment in Pike County, Kentucky, that the said Commonwealth's Attorney would agree that the proceeds from the sale of both properties would be paid to the petitioners herein, instead of being confiscated by the Commonwealth of Kentucky, and in view of these threats, they entered into an agreed judgment in an action styled Commonwealth of Kentucky, on relation of J. A. Runyon, Commonwealth's Attorney, against them, which was entered in the Circuit Court of Pike County, on the 13th

day of June, 1955. The property sought to be sold by this suit was the Spinning Wheel Motel Property. The Trocadero Property was not included in, or made the subject matter of the action filed by the Commonwealth's Attorney, but was ordered sold under the so-called agreed judgment.

Petitioners herein then on the 29th day of August, 1955, filed an action in the Circuit Court of Pike County, Kentucky, against J. A. Runyon, Commonwealth's Attorney, 35th Judicial District, and W. R. Walters, Trustee seeking to have portions of the agreed judgment in the other action declared void, as violating their constitutional rights, in that it required them to sell the Trocadero property, which was not a part of the action filed by the Commonwealth Attorney, and no local option violations had been alleged as having been committed on this property within 5 years prior to the filing of the action, and further that the judgment, in perpetually and permanently enjoining and restraining them from investing, having any interest in, owning, conducting, or operating a motel, hotel, restaurant, or any place of entertainment in Pike County, Kentucky, violated their rights under the 14th Amendment to the Constitution of the United States, and took from them rights which are inherent and inalienable under the Constitution. The complaint in this action brought into question the federal questions sought to be reviewed (transcript of record, page 7).

The Pike Circuit Court's ruling on the case to have the prior judgment declared void, held that under the agreed judgment that the Trustee could sell the Trocadero property, but held that the perpetual and permanent injunction restraining them from investing, or having any interest in, owning, conducting, or operating a motel, hotel, restaurant, or any place of enter-

tainment in Pike County, Kentucky, was void, as it violated their constitutional rights.

The petitioners then appealed to the Court of Appeals of Kentucky from the opinion of the Circuit Court, seeking to have the Circuit Court's opinion reversed, insofar as it held that the Commonwealth could force a sale of the Trocadero property under the original agreed judgment.

The respondents cross appealed, asking the Court of Appeals of Kentucky to reverse the opinion of the Circuit Court, and hold that the constitutional rights of the petitioners were not violated in preventing them from owning, investing in, or operating certain real property for businesses in Pike County.

The Kentucky Court of Appeals rendered an opinion in this case on the 22nd day of June, 1956, confirming the Circuit Court's ruling requiring the sale of the Trocadero property, but reversing the Circuit Court's ruling that the constitutional rights of the petitioners had been violated. The opinion of the Kentucky Court of Appeals seemed to indicate they felt that no constitutional rights of the petitioners had been violated because to operate hotels, motels, and places of entertainment, usually required some kind of license. However, the Court overlooked the fact that the injunction not only prevented the petitioners from conducting certain kinds of business, but also prevented them from owning or investing in certain types of real estate.

On the 19th day of July, 1956, the petitioners then filed with the Kentucky Court of Appeals, a petition for rehearing, and the Court denied the petition for rehearing on the 12th day of October, 1956, and on October 12, 1956, issued a mandate which overrules the petition for rehearing and putting into force and ef-

fect its original opinion, which required the Circuit Court of Pike County, Kentucky, to then enter a judgment, which was entered on October 27, 1956, which reaffirms and places in effect the original agreed judgment, which is under attack by these petitioners. The original judgment which petitioners seek to have portions declared void and the opinion of the Court of Appeals of Kentucky is annexed hereto.

REASON FOR GRANTING THE PETITION

The Kentucky Court of Appeals has decided important questions of Federal Law which has not been, but should be settled by this Court.

(1) The right to own, invest in real property such as a motel, hotel, restaurant, or place of entertainment is a right secured to all citizens under the 14th Amendment of the Constitution of the United States, and is a right that is inherent and inalienable, that cannot be taken away from a citizen of the United States, and protects a citizen from voluntarily giving away such rights.

(2) Under the judgment and opinion, they are required to let the Commonwealth sell and dispose of real estate owned by them in violation of the 14th Amendment of the Constitution of the United States.

(3) Forced the petitioners to accept punishment and penalties not provided by law in violation of the 14th Amendment of the Constitution of the United States.

Thus, three separate and distinct rights claimed by the petitioners under the 14th Amendment of the Constitution of the United States has been decided by

a state court, but not previously passed on by the Supreme Court of the United States, leave the law, and certainly as applied to the facts or issues raised herein undetermined, and the determination of this question by this Court will settle the point of law, and remove the uncertainty and make for uniformity of decisions as to rights of litigants under facts such as presented herein, respecting their rights under the Constitution of the United States.

WHEREFORE, it is respectfully submitted that this petition of writ for certiorari to review the opinion and mandate of the Court of Appeals of Kentucky, should be granted.

Respectfully submitted,

L. D. MAY,
Pikeville, Kentucky,
Attorney for Petitioners.

HENRY D. STRATTON,
Pikeville, Kentucky,
Attorney for Respondents.

APPENDIX

COMMONWEALTH OF KENTUCKY, ON RELATION OF J. A. RUNYON, COMMONWEALTH'S ATTORNEY

vs. AGREED JUDGMENT

HIRAM J. BAILEY,
REBA BAILEY,
ELIZABETH BAKER
AND ROY BAKER

WHEREAS, the plaintiff filed this action May 28, 1955, seeking to have the property described in the complaint, commonly known as the Spinning Wheel Motel, padlocked, or that said property be forfeited to the Commonwealth, the primary purpose being to stop and prevent the defendants, Hiram J. Bailey and Reba Bailey, from occupying and using said property for illegal purposes, and

WHEREAS, it is the position of the plaintiff that the only way to stop and prevent the use of said property for illegal and immoral purposes is to compel and require the defendants, Hiram J. Bailey and Reba Bailey, to sell property by conveying the same to a Trustee with full power and authority to sell the same to one or more persons not engaged in selling alcoholic beverages in violation of the local option law and have not been convicted of violating any of the provisions of said law and by enjoining and restraining said defendants and each of them from violating any of the provisions thereof, and

WHEREAS, the grantors own two tracts of land located at Damrontown, on Pond Creek, in Pike County, Kentucky, known as the Trocadero, and the defendants consent and agree that said property be sold by the Trustee on the terms and conditions hereinafter set out, in consideration of the Commonwealth consenting and agreeing that Tracts 1 and 2 described in the complaint be sold by said Trustee and that the proceeds from the sale thereof, less cost of selling the same, be paid to the defendants, Hiram J. Bailey and Reba Bailey, and

WHEREAS, the Commonwealth of Kentucky, in consideration of the defendants, Hiram J. Bailey and Reba Bailey, consenting and agreeing that a permanent and perpetual injunction be issued against them, enjoining and restraining them from engaging in the motel, hotel, restaurant or establishments of similar nature and from violating any of the provisions of the local option law of this Commonwealth, has consented and agreed that all of the land hereinafter described be sold by the Trustee on the terms and conditions set out herein and that Hiram J. Bailey and Reba Bailey, after the payment of cost and fees of the Trustee, receive the proceeds from such sale or sales.

NOW THEREFORE, the premises considered, and by consent of the parties, it is ordered and adjudged by the Court:

(1) That the defendants, Hiram J. Bailey and Reba Bailey, simultaneously with the entry of this judgment, execute and deliver a deed of Trust to W. R. Walters, Trustee, for the following described property, situated in Pike County, Kentucky, and more particularly described as follows, to-wit:

TRACT NO. 1:

That certain tract or parcel of land situated in Pike County, Kentucky, on the East side of Levisa Fork of Big Sandy River, and on the West side of U. S. Highway No. 23, and lying a short distance above the mouth of Turnhole Branch of said river, being the property upon which tourist camp known as the Spinning Wheel is located, and being more particularly described as follows, to-wit:

Being and beginning at a stake on the west side of said Highway No. 23, known as the Mayo Trail, corner to lands of Minnie Newsome, said stake being 30 feet from the center of line of the concrete pavement of said highway; thence running down the highway in a southerly direction with the right of way line, a distance of 197 feet to an iron stake on or near said right of way line; thence running toward the river a distance of approximately 80 feet to another iron stake: thence continuing the same course to the river: thence running up the river to a stake at the low water mark, a corner of Minnie Newsome property; thence leaving the river and running S 38 00 E 35 feet to a stake in the center of a drain; thence running with said drain toward the highway S 12 01 E 68.8 feet to a stake in the center of said drain (witness S 100 E 19.8 feet to a wild cherry tree); thence S 34 31 E 174.5 feet to the beginning, being a portion of the property conveyed to Pluma McCoy Johnson by deed from Roy A. Burks and Lora Burks, his wife, dated September 6, 1938, recorded in Deed Book 201, page 101, Pike County Court Clerk's Office, and by deed from W. W. Barrett, Commissioner, to Pluma McCoy Johnson, dated February 23, 1939, recorded in Deed Book 204, page 417, Pike County Court Clerk's Office, and from Pluma McCoy Johnson and Ferrell Johnson to Eulan Salyer and John R. Salyer, by deed dated March 5, 1946, and recorded in Deed Book 285, page 210, Pike County Court Clerk's Office.

Being the same property deeded to parties of the first part by date of August 24, 1948, from Eulan

Salyer, Lorraine Salyer, and John R. Salyer and Mildred Salyer, his wife, said deed being recorded in Deed Book 299, at page 496, in the Office of the Clerk of the Pike County Court.

TRACT NO. 2:

On tract or parcel of land in Pike County, Kentucky, and on the Big Sandy River and lying between U. S. Highway 23 and Big Sandy River at or near mouth of Turn Hale Branch.

Described as follows: Beginning at a hub on the west line of the highway right of way, corner of property of 2nd party; thence running in a southerly course with the west line of the road right of way, a distance of 172 feet to an iron stake at the edge of the road right of way; thence leaving the right of way and running across the bottom, in the direction of the river to an iron stake on the high ground near the river; thence continuing the same course to the river; thence down the river with the meanders to the property line of party of the second part with her line up the drain, to the beginning, being the same property conveyed to first parties herein by deed dated September 25, 1948, and title bond executed September 25 1948, being recorded in Deed Book 301, at pages 513 and 515, respectively, of the Pike County Court Clerk's records, and by deed recorded in Deed Book 322, at page 263, of the Pike County Court Clerk's records. Said deed being executed by Minnie Newsome and Robert Joseph Newsome and his wife to parties of the first part.

Hiram J. Bailey acquired title to the above described tracts of land by deed from Elizabeth Baker and Roy Baker, her husband, which deed is dated August 4, 1950, recorded in Deed Book 326, page 360, Pike County Court Clerk's Office.

TRACT NO. 3:

A certain lot situated near Damrontown, on Pond Creek, in Pike County, Kentucky, and being a part of

what is known as Lot No. 9, of the Isham Blackburn heirs land, and bounded as follows:

Beginning at a planted stone at the edge of the County road in line with lot #8; thence following the reverse line of lot # 8 S 72 W 78 feet to a planted stone; thence running in a direction up the creek 50 feet to a planted stone; thence back to the County Road 70 feet to a planted stone at the edge of the road; thence crossing the County Road to the center of Pond Creek; thence down the Creek 55 feet with the center of the Creek to a stake; thence crossing the County Road to the place of beginning, so as to include all the land in said boundaries. The mining rights owned by the Tierney Mining Company and Tierney Coal Company are hereby excepted.

H. J. Bailey acquired title to said land by deed dated Feb. 10, 1939, from F. A. Hopkins and Minda Hopkins, which deed is recorded in Deed Book 200, page 603, Pike County Court Clerk's Office. Reba Bailey acquired title to said land by deed dated March 12, 1948, from H. J. Bailey, which deed is recorded in Deed Book 276, page 429, Pike County Court Clerk's Office.

TRACT NO. 4:

A certain tract or parcel of land lying in Pike County, Kentucky, on Pond Creek, containing 2 acres, more or less. Bounded and described as follows: A lot with improvements thereon, situated at Damrontown, Pike County, Kentucky, and being the same lot allotted Harmond Blackburn from the estate of Harve Blackburn, deed bearing date the 2nd day of December, 1925, and recorded in Deed Book 135, page 580, Pike County Court Clerk's Office, and bounded as follows, to-wit:. On the North by lot of R. T. Blackburn, on the South by lot of Harmond Blackburn, on the East by Pond Creek and lands owned by Wayne Blackburn.

H. J. Bailey acquired title to said land by deed dated September 15, 1941, from Henry J. Scott, Commissioner of Pike Circuit Court, which deed is recorded

in Deed Book 288, page 543, Pike County Court Clerk's Office. Reba Bailey acquired title to said land by deed dated March 12, 1948, from H. J. Bailey, which deed is now of record in the office of the Clerk of the Pike County Court in Deed Book 275, page 427.

(2) That the defendants, Hiram J. Bailey and Reba Bailey, simultaneously with the entry of this judgment, execute and deliver to said W. R. Walters, Trustee, a Power of Attorney, authorizing said Trustee to sell and convey said lands in fee and on the terms and conditions hereinafter set out with proper covenants of warranty.

(3) That the purchasers of said lands must be persons who have never been convicted of violating any of the provisions of the local option law or of maintaining a common nuisance or house of prostitution or have any criminal record: that the sale or sales of said lands must be to bona fide purchasers possessing financial responsibility, to be approved by the plaintiff.

(4) That said Trustee shall within sixty (60) days from the entry of this judgment sell Tracts 1 and 2 herein described at public auction to the highest and best bidder, exercising a sound discretion as to the character of person or persons described in numerical paragraph (3) hereof, requiring a down cash payment of not less than one-fourth (¼) of the total purchase price and the balance payable on such terms as the Trustee deems proper and that possession of said property be fully and completely surrendered by the defendants, Hiram J. Bailey and Reba Bailey, to such purchaser or purchasers immediately after such sale and upon their failure to do so a writ of possession shall be issued by the Clerk of this Court on request in favor of the purchaser or purchasers and against said defendants.

(5) That as to Tracts Nos. 3 and 4, described herein, known as the Trocadero, it is ordered by the Court that W. R. Walters, Trustee, shall have and he is given a period of four (4) months in which to sell and dispose of said property, the purchaser being the same type and character of person and on the terms described in numerical paragraphs (3) and (4) hereof, to be approved by the plaintiff, provided, however, that in the event said Trustee by reason of misfortune, unavoidable casualty or other unforeseen circumstances is not able to sell and dispose of said property for a fair price within said period, he may petition the Court for such additional time as he deems proper.

(6) That the defendants, Hiram J. Bailey and Reba Bailey, on the date of sale and at the time deed or deeds are delivered conveying said property pursuant to the sale, shall deliver possession of said property and from and after the date of sale shall have no interest, direct or indirect, in the ownership, control, management, supervision or operation of said properties including the improvements thereon.

(7) That said Trustee shall have full power and authority pursuant to this judgment and the terms of the Deed of Trust and Power of Attorney to sell and dispose of said properties to the highest bidder and after said Trustee has sold and executed deeds of conveyance for such properties, he shall file a report or reports showing to whom he has sold such properties and the terms of the sale thereof. The Court, after considering such report or reports, shall fix a reasonable fee for the services of such Trustee to be paid by the defendants, Hiram J. Bailey and Reba Bailey.

(8) In the event W. R. Walters, Trustee, sells any one or more of said tracts of land at public auction,

then the reasonable cost of advertising such sale shall be paid from the proceeds of sale.

(9) In the proceeds from the sale of said lands after deducting reasonable fees fixed for the services of the Trustee and cost, shall be delivered to the defendants, Hiram J. Bailey and Reba Bailey, and in the event said lands or any part thereof be sold on terms after down payment of one-fourth cash, said Trustee shall take notes representing the unpaid purchase price payable to Hiram J. Bailey and Reba Bailey, with a lien retained in the deed or deeds to secure the payment thereof together with such other provisions for the enforcement of such lien in the event of default by the purchaser or purchasers.

(10) That said Trustee arrange with some solvent insurance company or companies for the protection of the improvements on the lands herein described against loss by fire between the date of the entry of this judgment and the sale thereof and that the Trustee provide in the deed or deeds conveying said properties that the purchaser insure the improvements thereon against loss by fire with loss payable clause or clauses in a sum or sums sufficient to protect the defendants, Hiram J. Bailey and Reba Bailey, in the collection of the unpaid purchase price.

(11) That the defendants, Hiram J. Bailey and Reba Bailey, be and they are each permanently and perpetually enjoined and restrained from investing, having any interest in, owning, conducting or operating a motel, hotel, restaurant or any place of entertainment in Pike County, Kentucky, and they are each further perpetually enjoined from violating any of the provisions of the local option law in Pike County,

Kentucky, and they are each further perpetually enjoined from violating any of the provisions of the local option law in Pike County, Kentucky.

(12) It appears from the complaint and from statements of counsel representing the parties that on August 4, 1950, the defendants, Elizabeth Baker and Roy Baker, sold and conveyed Tracts 1 and 2 described herein to the defendant, Hiram J. Bailey, the deed being recorded in the office of the Clerk of the Pike County Court in Deed Book 326, page 360, and that Elizabeth Baker retained a lien in said deed to secure the unpaid purchase price and that on October 31, 1951, Elizabeth Baker sold and delivered said purchase money notes to Oscar C. Sowards and Mary Elizabeth Sowards; that twelve notes in the principal sum of $500.00 each, bearing interest at the rate of six per cent from August 4, 1950, until paid, remain unpaid and that said principal sum of $6,000.00, with interest, constitutes a prior lien against said Tracts 1 and 2 and the proceeds derived from the sale thereof.

It is now ordered by the Court, by and with the consent of the parties, that W. R. Walters, Trustee, be and he is authorized and directed to pay and satisfy said indebtedness from the proceeds of the sale of said property and release the lien retained in said deed to secure such payment, or in lieu thereof require the purchaser of said tracts of land to assume and agree to pay said indebtedness with interest thereon, and in the event the purchasers of said lands assume and agree to pay said indebtedness now held by Oscar C. Sowards and Mary Elizabeth Sowards, then and in that event the Trustee will retain a lien in the deed or deeds executed by him to secure the payment of such indebtedness.

(13) That this action as against the defendants, Elizabeth Baker and Roy Baker, be and the same is dismissed.

(14) That the lis pendens filed May 31, 1955, by the plaintiff in the Office of the Clerk of the Pike County Court, asserting a lien against Tracts 1 and 2 described herein, be and the same is now released and J. A. Runyon, Commonwealth's Attorney of the 35th Judicial District of Kentucky, be and he is authorized and directed to release said lien on the margin of the record where it is recorded.

(15) That the plaintiff recover of and from the defendants, Hiram J. Bailey and Reba Bailey, the cost of this action, and this cause is retained on the docket for such order or orders as may be proper respecting the payment of cost and services of the Trustee.

COMMONWEALTH OF KENTUCKY

By: J. A. RUNYON,
Commonwealth's Attorney, 35th Judicial District of Kentucky.

H. J. BAILEY,
(H. J. Bailey), Defendant.

REBA BAILEY,
Reba Bailey, Defendant.

FRANCIS M. BURKE,
JOHN PAUL RUNYON,
Attorneys for Defendants.

COURT OF APPEALS OF KENTUCKY

HIRAM J. BAILEY, ET AL. - - - - - - *Appellant*

VS. APPEAL FROM PIKE CIRCUIT COURT,
HON. JEAN L. AUXIER, JUDGE

J. A. RUNYON, COMMONWEALTH'S ATTORNEY, ET AL.
Appellee

OPINION OF THE COURT BY JUDGE MOREMEN
AFFIRMING IN PART
REVERSING IN PART

Appellant, Hiram J. Bailey, has been a notorious bootlegger for many years. He operated usually from a restaurant or motel which he owned. From 1939 to 1950 he operated a restaurant and nightclub known as the Trocadero which operation apparently was terminated as the result of a threatened forfeiture action filed in that year by the Commonwealth's Attorney. Immediately after it was closed the Baileys purchased the Spinning Wheel Motel where they continued their illicit business for almost five years. In April, 1955, apparently recognizing that their property was in imminent danger of forfeiture, Bailey and his wife made arrangements with a company of auctioneers to sell the motel at an auction to be held in June. Nevertheless they continued the same operation.

On May 25, 1955, officers raided the Spinning Wheel and found 85 cases of beer and 12 cases of

whiskey. Bailey pleaded guilty before a justice of the peace at a time when neither the county attorney nor the Commonwealth's Attorney was present.

On May 27, 1955, appellee, Hon. J. A. Runyon, Commonwealth's Attorney, filed an action under Chapter 242, KRS, to enjoin the nuisance and to forfeit and sell the Spinning Wheel property because of its continuous illegal use. The proceeds of such a sale, less certain valid expenditures, are turned over to the Commonwealth in the manner provided by statute.

Appellants entered into negotiations with the Commonwealth's Attorney for the purpose of saving their property from absolute forfeiture and were successful in accomplishing that purpose. An accord was reached and an agreed judgment was entered in the action pursuant to which Bailey executed deeds conveying both the Trocadero property and the Spinning Wheel property to W. R. Walters who, as trustee, was to sell the property and deliver the proceeds of the sale, after expenses, to appellants. As part consideration for the agreement, appellant further consented to a judgment permanently and perpetually enjoining Bailey and his wife from investing or having any interest in or owning or conducting or operating a motel, hotel, restaurant, or any place of entertainment in Pike County.

The properties were deeded to the trustee in conformity with the judgment and the trustee promptly sold the Spinning Wheel for $67,000. The proceeds, after deduction of expenses, were distributed to appellants as agreed.

Before the trustee could dispose of the Trocadero, appellants instituted this action: first, to enjoin the sale of the Trocadero property and, second, to declare unlawful the provision of the agreed judgment perpetually enjoining the Baileys from owning or operat-

ing hotels, motels or places of entertainment in Pike County.

The trial court refused to enjoin the sale of the Trocadero in accordance with the agreed judgment but held invalid that portion of the agreed judgment which enjoined the Baileys from engaging in the types of business enumerated.

The Baileys have appealed from that portion of the judgment which permitted the sale of the Trocadero and the Commonwealth's Attorney has cross-appealed from that portion of the judgment which held the provision as to the future business activities of the Baileys unconstitutional.

The right of the Commonwealth to forfeit property used in an illegal business has been under discussion in several opinions. In Rickman v. Commonwealth, 204 Ky. 848, 265 S. W. 452, it was pointed out:

> "The power of the state to forfeit and sell the property is an incident of its police power. Under its police power it may abate nuisance and may take such steps as are necessary to this end. It may do this by either a civil or a criminal proceeding, but the power only extends to what is reasonably necessary to abate the nuisance. Under this power the state could not provide that all the property a man has, though in no wise connected with the nuisance, should be forfeited to the state."

The same principle is reaffirmed in Froedge v. Commonwealth, 289 Ky. 188, 158 S. W. (2) 426, so we see that through the forfeiture, while limited to the res involved in the illegal transaction which resulted in a nuisance, the state has, under its general police power and under the statute, the right to appropriate that property which was instrumental in creating the condition.

With this idea in mind, when we turn to the facts of the instant case, we find that the nuisance, which the Commonwealth was attempting to abate, may not be found in the inherent quality of the physical structures involved, but in the type of operation which lends itself to the illicit sale of intoxicants. We have here a man whose record for bootlegging activities extends over a long period of time. His first operations were from the restaurant or nightclub known as the Trocadero. Approximately a little over four years before the agreed judgment under attack was entered into, he abandoned his operation at that place and began anew at the Spinning Wheel Motel. He had bootlegged from both the Trocadero and Spinning Wheel and these properties were actively used in the promotion of that enterprise. This is quite different from the facts and examples given in the case above cited where the property was not being used and never had been used for an illicit purpose. The Commonwealth had the right to proceed against that property which had been used and reasonably might be expected to be used in the future. Both the Trocadero and the Spinning Wheel may be identified by those characteristics. Furthermore, the statute of limitation is expressly established by KRS 413.120 (3) at 5 years. The action in this case out of which the judgment against the Trocadero was entered was started within this time. Moreover, the Baileys voluntarily entered into the agreed contract which was embodied in the judgment subsequently entered. They permitted the sale of part of the property and accepted the proceeds of that sale and should not now be allowed to accept the benefits under the contract and deny the remaining portion.

The trial court was of the opinion that so much of the agreed judgment which perpetually enjoined the

Baileys from owning or operating hotels, motels, restaurants or places of business of similar nature in Pike County was void. He based his opinion upon the belief that each man has an inalienable right under the Constitution to own and enjoy property. Although he recognized that under the general law in certain instances a restraint might legally be placed upon a person's business operation, he believed that the limitations here were too severe to satisfy the general rule.

It is suggested at the outset that general rules as to restraint of trade are applicable only to legitimate businesses, and illicit activities may be restrained and are restrained without limitation either to time or space but even were the general rules of contract applied to the case at bar, we find no inhibition. In Ceresia v. Mitchell, Ky., 242 S. W. (2) 359, the following excerpt from 17 C. J. S. Contracts, Sec. 244, was approved:

> "Generally, an agreement imposing a restraint reasonably limited in space is not against public policy, although unlimited in time of operation, regardless of the nature of the business or occupation restrained."

While we believe the law concerning the restraint of trade applies only to legitimate businesses, still the application of that general law would not render the instant contract unconscionable and therefore illegal.

The act of operating hotels, motels, et cetera, may result only from a license granted by the proper authorities and that right is not an inalienable one but may be granted or withdrawn under the broad police powers of the state or governing body under due process of law. We believe, therefore, the Court erred in striking from the contract and judgment that portion

which enjoined the operation of the Baileys in the fields described.

For the reasons given, the judgment is affirmed on original appeal and reversed on cross-appeal, and remanded for entry of judgment in conformity with this opinion.

Attorney for Appellant:

L. D. MAY, Pikeville, Ky.

Attorneys for Appellee:

HENRY STRATTON, Pikeville, Ky.

FRANCIS D. BURKE, Pikeville, Ky.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

HIRAM J. BAILEY and
REBA BAILEY - - - - - - - - *Petitioners*

Vs. RESPONSE TO PETITION FOR WRIT OF CERTIORARI

J. A. RUNYON,
COMMONWEALTH'S ATTORNEY,
35th JUDICIAL DISTRICT, and
W. R. WALTERS, TRUSTEE - - - *Respondents*

TO THE HONORABLE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners pray that a writ of certiorari issue to review the decree of the Court of Appeals of Kentucky and the judgment entered in conformity therewith by the Pike Circuit Court of Kentucky on October 27, 1956.

The Respondents oppose the petition for the reason and on the ground that no Constitutional Question is involved.

QUESTIONS PRESENTED

The central question involved in this case is whether or not a party to an action which was termi-

nated by an agreed judgment, may later repudiate and avoid the consequences of the agreed judgment, without a restoration of the parties to the status occupied prior to its entry.

SUMMARY STATEMENT

The Legislature of Kentucky, by Statute, permits political units, by election, to determine whether or not alcoholic beverages may be sold in the particular territory. Pike County, Kentucky, by election is "dry" territory. The Legislature of Kentucky has further in support of the "Local Option Law," declared that property used in violation of the Local Option Law is a Nuisance and provided for its forfeiture through civil action, as in the case of other public nuisances.

The record discloses that the petitioners, throughout the years 1941 through 1955, during most of which time, Pike County, Kentucky was "dry" territory, were consistent and frequent violators of the Local Option Law. In this period they accumulated twenty (20) convictions which involved two hundred and fifty (250) days of jail sentence and Two Thousand and Twenty-nine ($2029.00) Dollars in fines.

From 1941 until August 4, 1950, the petitioners operated an illegal night club called the "Trocadero". This operation was terminated and the business closed as a result of a forfeiture suit filed in that year. This action was never prosecuted to judgment after petitioners closed the business.

In August 1950, the petitioners purchased the "Spinning Wheel Motel," and resumed business at

this new location. The "bootlegging" activities continued with raids, arrests and convictions from time to time.

On May 27, 1955, the appellee, J. A. Runyon, Commonwealth's Attorney for the 35th Judicial District of Kentucky filed an action to forfeit the "Spinning Wheel" property because of its constant illegal use.

Almost immediately the petitioners began negotiating for a settlement of the case, which was concluded under an agreed judgment providing substantially as follows:

(1) That petitioners would convey the "Trocadero" and "Spinning Wheel" property to respondent, W. R. Walters, as Trustee to sell the same at public auction, petitioners to receive the proceeds.

(2) That petitioners would be thereafter enjoined from owning or operating hotel, motel, restaurant or entertainment property in Pike County, Kentucky thereafter.

The Trustee immediately sold the "Spinning Wheel" property for Sixty-seven Thousand ($67,000.00) Dollars, and pursuant to order of court disbursed the money to petitioners. Several months later when he commenced advertising the sale of the "Trocadero" property, this action was commenced, seeking to set aside the agreed judgment. No restoration of the consideration received was made, nor was there any tender or offer to do so.

The Pike Circuit Court confirmed the right of the Trustee to sell the property but adjudged the injunction features of the agreed judgment void.

On Appeal to the Court of Appeals of Kentucky, the right of the Trustee was affirmed and the injunction feature of the agreed judgment upheld. Judgment was then entered by the Pike Circuit Court of Kentucky in conformity with the opinion, and this proceeding followed.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

No Federal Constitutional Question is presented.

The 14th Amendment to the Constitution of the United States prohibits a state from "depriving a person of life, liberty, or property without due process of law." Admittedly, the ownership of land is a property right, and the right to acquire property is also a property right. These are limited rights since under the "police power" the right of the state to forfeit property used in violation of law has been consistently upheld.

The proceeding would not be subject to question on constitutional grounds had the forfeiture suit proceeded to judgment and the "Spinning Wheel" property worth Sixty-seven Thousand ($67,000.00) Dollars been confiscated. The Kentucky Statute (Appendix A) contemplates arrangements of a lesser nature by providing that the commonwealth's attorney must consent to any dismissal of the action. The petitioners took advantage of this and bargained their way to virtual freedom. For the price of Sixty-seven Thousand ($67,000.00) Dollars which they saved, they gave up the right to continue to own two parcels of land, and the right to engage in the

hotel, motel, restaurant, or entertainment businesses in Pike County, Kentucky. They exercised their constitutional right to contract for their own benefit. Petitioners now seek to retain the fruits of this contract—entered as an agreed judgment—while at the same time relieving themselves of the obligations which they assumed.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

242.310--2554c-24 RENTING OF PROPERTY, OR HIRING VEHICLE FOR TRANSPORTATION IS NUISANCE; FORFEITURE. (1) Any person knowingly or intentionally renting or permitting the use of, or using, any premises, or part thereof, or any vehicle for the purpose of unlawfully selling or transporting or possessing intoxicating liquors in dry territory, shall be guilty of a nuisance and of a violation of this chapter.

(2) Any property so used shall be forfeited to the state. The forfeiture shall extend to the whole of the premises or vehicle owned by the defendant, or to his interest in said property, including all land and buildings in one boundary.

242.320--2554c-24 ACTION FOR FORFEITURE. (1) Any Commonwealth's attorney, county attorney, mayor of a city, or any private citizen may maintain an action in equity in the name of the state upon relation of said officers or citizen against the owner to forfeit property declared a nuisance by KRS 242.310.

(2) In such action evidence of the general reputation of the place or property and of the defendant shall be admissible.

(3) If the petition is filed by a private citizen, it shall not be dismissed except upon a sworn statement made by the citizen and his attorney, setting forth the reasons why same should be dismissed, and except upon approval in writing in open court by the Commonwealth's attorney or the county attorney.